IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 34

GEORGE HARRIS,
*Petitioner,*
v.
THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

## MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM AND AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS

In Support of Petition for Rehearing


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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to the provisions of Rule 27(9) of this Court, the Congress of Industrial Organizations and certain of its affiliated organizations made application to all of the parties to the instant case for written consent to the filing of a memorandum amicus curiae. Counsel for petitioner in response to the request replied that he would neither oppose nor consent. The acting solicitor general on behalf of the United States gave his consent. Special reasons for the granting of this motion are contained in the accompanying memorandum.

INTEREST OF PARTIES FILING THIS MEMORANDUM

The Congress of Industrial Organizations and its affiliated organizations seek leave of the Court to file the within memorandum. The construction which the majority of the Court has placed upon the Fourth Amendment to the Constitution of the United States is of great concern to all members of the

Congress of Industrial Organizations and its affiliated organizations. Under this new construction police officers are afforded an almost unlimited means of search and seizure unhampered by the cherished safeguards of the Fourth Amendment. Aware that the destruction of any of the guarantees of the Bill of Rights constitutes a threat to the existence of that climate of democratic liberty which is essential to the functioning of free trade unions, the Congress of Industrial Organizations believes that the decision in this case is of vital importance to it.

## ARGUMENT

The effects of the decision are far-reaching:

1. It authorizes a search of a home without a search warrant, a thing never before sanctioned by our courts and which the Fourth Amendment expressly prohibits.

2. It authorizes a seizure of unlimited types of property without a search warrant, whereas previously only the most limited right to seize without a search warrant was recognized —a right to seize only contraband goods or tools of crime and then only when they happened to come under the eyes of police officers without a search.

3. It authorizes a search of the kind never before permissible under any circumstances—the general exploratory search, for which not even a warrant can issue since the Fourth Amendment explicitly restricts the search warrant to things "particularly" described.

4. It authorizes a seizure of the kind never before permissible under any circumstances—whereas a seizure under a warrant is always limited to goods particularly described in the warrant the seizure here may be of goods no one ever suspected even existed.

Thus the effect of the decision is not merely to legalize conduct of police officers where they lacked a warrant but to legalize conduct never permissible under a warrant. The decision therefore not merely allows police to omit to secure a warrant but puts a premium on their use of this new method of search since it affords them privileges no warrant could confer.

The decision greatly reduces the security and privacy which

the American citizen believed the Constitution guaranteed. The Court assumes that its decision follows a line of precedents. On each point it purports to rely on authorities. If gradually over the years the rights protected by the Fourth Amendment had been so whittled away that precedents add up to the present great loss, there would be real cause to begin a reconsideration of where the cases had step by step led the courts. But an examination of the precedents cited shows that the Court has taken language out of context and without regard to its reasoning as the basis for reaching the present astounding decision.

1. The Court states that the right to search at the time of a lawful arrest has always been recognized (Slipsheet, p. 5). It points to language in opinions which state that the right to search a prisoner extends to things in his possession as well as on his person. It therefore assumes that because his home or office is in his possession it may be searched as an incident to the arrest. But the one exception to the right to search without a warrant when making a lawful arrest has always been narrowly limited by the reasons for this exception. Courts have pointed out that the right to search a prisoner upon lawful arrest is necessary to deprive the prisoner of potential means of escape, *Closson* v. *Morrison*, 47 N. H. 482, or to prevent the prisoner from destroying evidence otherwise properly subject to seizure, *Reifsnyder* v. *Lee*, 44 Iowa 101, 103; *Holker* v. *Hennessey*, 141 Mo. 527, 42 S. W. 1040.

The application of the requirements of the Fourth Amendment to the search of a prisoner would have made a farce of the right to arrest. If an officer had to await the judicial steps incident to the issuance of a warrant before he could search a prisoner for a weapon or take it away from him, the officer might first lose his prisoner. This exception included only the right to search a prisoner and to seize objects on him or within his reach. When the courts used the word "possession" here they had reference to immediate physical possession of weapons or property which made actual use or disposition of the property before a warrant could be had such a risk that foregoing of a warrant was essential. Hence such a search and seizure has not been deemed to be "unreasonable" within the meaning of the Fourth Amendment.

But these cases have never suggested that the search of rooms or buildings which can easily be maintained in status quo until a warrant has issued would ever be justified. To search or seize in any circumstance where a warrant could be obtained without real risk of losing the prisoner or goods is always "unreasonable" under the Fourth Amendment. This Court by ignoring the reasons for this narrow exception and by enlarging the exception to include a vast area where the reasons for the exception have no possible application, has virtually wiped out the Fourth Amendment.

2. This Court has repeatedly held that "an arrest may not be used as a pretext to search", *United States* v. *Lefkowitz*, 285 U. S. 452, 466, and cases there collected. It is clear that these holdings had reference to a lawful arrest and recognized the very narrow limits upon the searches and seizures which could properly accompany an arrest. This Court, however, assumed in the instant case that a lawful arrest could take the place of a search warrant as the basis of a broad search and seizure. It distinguished the *Lefkowitz* and other cases by asserting, "Nor is this a case in which law enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search" (Slipsheet, p. 7).

But under the decisions it is clear that even a *bona fide* arrest cannot afford the basis for a search and seizure without a proper warrant. The Fourth Amendment makes explicit the requirement that the warrant describe "the place to be searched, and the persons or things to be seized." It leaves no room for assuming that a warrant for the seizure of a person obviates the necessity for a warrant describing the place to be searched and the things to be seized. This Court has repeatedly stated the high public policy which motivated and justified the requirement that searches and seizures be limited to such places and things as have been authorized in a warrant issued "upon probable cause, supported by oath or affirmation." In the *Lefkowitz* case this Court pointed out that "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried actions of officers and others who may hap-

pen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime" (285 U. S. at 464).

It is submitted that the *bona fides* of the arrest cannot afford a proper substitute for a warrant issued by judicial authority. Down through the years both American and English courts have deemed the securing of a warrant particularly describing the place to be searched and the thing to be seized as but a minor inconvenience to police officers—a mere trifle in delay and trouble—when compared with the great good resulting from the secure knowledge of all citizens that their homes could not be searched nor their possessions seized until a magistrate had received an oath or an affirmation that there was probable basis to search in a given place for given goods and had issued a warrant limited to the place and things described. If the decision of this Court is left in effect that security is wiped out. Police officers are by fiat of this Court authorized to make an unlimited search or seizure whenever they are able to effectuate an arrest at the place they desire to ransack. Even though no person has ever sworn or affirmed that any illegal goods were possessed, police officers may conduct a search without prior limitation as to scope. Nor will police officers be limited to the seizure of illegal goods which the oath or affirmation afforded basis for believing were at a given place; since there will be no search warrant particularly describing the goods to be seized, any goods may be seized.

3. The Court attempts to justify the seizure in this case on the ground that "In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search." (Slipsheet, p. 9.) Such a doctrine would give police officers the incentive to make unlawful searches by assuring them that the success of the search will retroactively legalize it. This Court has steadfastly held that "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional

system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. *Weeks v. United States*, 232 U. S. 383, 393; *Gauled* v. *United States*, 255 U. S. 298, 306; *Amos* v. *United States*, 255 U. S. 313; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391; *Agnello* v. *United States*, 269 U. S. 20, 22." *Byars* v. *United States*, 273 U. S. 28, 29. In the *Byars* case the goods which this Court held were improperly seized were counterfeit federal internal revenue stamps. If the continuing crime of possessing such stamps did not justify their seizure in the *Byars* case it is hard to see how the nature of the draft registration cards in the instant case should call for a different result.

The words of this Court in the *Lefkowitz* case (285 U. S. 452, 462) are here applicable

> "There is nothing in the record to support the claim that, at the time of the arrest, the offense for which the warrant issued or any other crime was being committed in the presence of the officers."

Certainly the officers were unaware that any violation of the Selective Service Act was in progress when they undertook the search. Cf. *Go-Bart* v. *United States*, 282 U. S. 344, 357. If what transpired here may be said to justify a seizure without warrant because of a crime committed in the presence of officers, virtually all seizures without warrant will be legalized. All stolen goods, contraband goods, forged goods, give rise to the same legal theory of constructively continuing offenses. Never before had it been assumed that the protection of the Fourth Amendment was inapplicable because of an offense constructively committed in the presence of the officer.

4. The Court by sanctioning the seizure of the draft registration cards under the circumstances of the instant case gives approval to the general exploratory search. No contention has ever been made that the officers who searched the petitioner's apartment were looking for draft registration cards or any other articles pertaining to violation of the Selective Service Act. The Fourth Amendment prohibits the issuance of warrants for a general exploratory search for it requires that the goods to be seized be particularly described.

This Court has uniformly condemned general exploratory searches. *United States* v. *Lefkowitz*, 285 U. S. 452, 465; *Gauled* v. *United States*, 255 U. S. 298, 306, 310; *Amos* v. *United States*, 255 U. S. 313; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391.

The American people are profoundly shocked by the decision. An unprecedented number of articles, editorials, cartoons, letters to the press have appeared in the daily and weekly press continuously since the opinion was announced. Many of the articles and letters have been written by distinguished members of the bar. The great weight of opinion is that the decision virtually repeals the Fourth Amendment. See Twohey, *Analysis of Newspaper Opinion*, week ending May 10, 1947, p. 4.

For the foregoing reasons it is respectfully urged that this Court grant the petition for rehearing and reverse the judgment of the court below.

Respectfully submitted,

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